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No. 08-649

Supreme Court, U.S.
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In The

Supreme Court of the United States

CHARLES E. BAKER,

Petitioner,

v.

CANADIAN NATIONAL/ILLINOIS CENTRAL RAILROAD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF

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REPLY TO RESPONDENT'S INTRODUCTION

The Petition asks this Court to resolve two important questions of federal law that became unsettled when the Fifth Circuit made legal findings that are contrary to the plain language of the Roadway Worker Protection Rules (RWPR), 49 C.F.R. § 214. *See* Pet'r Br. at i. The Fifth Circuit's decision was not "fact-specific." The Fifth Circuit held as a matter of law that Baker's work did not require him to "foul" the track because the worksite was no closer than twenty feet from the track, and "Baker fouled the tracks and was hit away from the work site." App. 8. The Fifth Circuit held the RWPR do not apply to workers who are engaged in construction or maintenance of the roadway if they are struck by trains away from a "worksite" that is "on or near track." *Id.* These holdings are contradicted by the RWPR, which state that a "roadway worker" includes a worker whose ordinary duties are not "on or near track," if the worker's activities have "the potential of fouling a track." 49 C.F.R. § 214.7.

The district court held that Plaintiff ***was*** a "roadway worker." The jury's finding that Baker somehow "lost" this status was based on instructions containing limitations on the RWPR that were specifically rejected by the Federal Railroad Administration (FRA). Pet'r Br. at 14-15. The Fifth Circuit did not address this issue. App. 8, 11. Notably, the interpretation of law is ordinarily a judicial function; juries are limited to findings of fact. *See Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657

(1935). The jury never reached the issue of whether the crew's work was "near track." App. 80-85. The jury never apportioned fault between Baker and Respondent.[1] *Id.*

These decisions undermine FRA regulations issued pursuant to congressional mandate after a formal notice-and-comment procedure. Pet'r Br. at 10. The RWPR were intended to protect workers such as Baker. *Id.* These decisions were issued even as the FRA seeks to strengthen roadway worker protections. *Id.* at 9-12. The FRA cannot protect roadway workers if the federal courts refuse to apply the plain language of its regulations. For these reasons, the Petition should be granted.

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

There are no factual disputes for this Court to resolve. Respondent does not dispute that Baker was an employee of a contractor whose vehicle was struck by a train while he was engaged in construction or maintenance of the roadway. Tr. 90-93, 107-09. Respondent does not dispute that Canadian National and several other Class I railroads require roadway worker protection whenever the work is within twenty-five feet of the near rail of the track. *See* Pet'r

[1] Baker will refer to Respondent as "Respondent," in light of the dispute as to Respondent's relation to Canadian National.

Br. at 5-6. Respondent does not dispute that Illinois Central rules state that movement over crossings can only occur where protection is provided by a watchman, or where the employee in charge has received foul time or track and time from the control operator. Doc. 69, Ex. 12 at 8-10. Respondent does not dispute that it did not provide these or any of the other protections required by the RWPR to Baker or his crew. Tr. 201, 545.

The Fifth Circuit acknowledged testimony by Leon Davis that the work site was as close as twenty feet from the near rail, but held as a matter of law such work would not be "near track." App. 8, Tr. 185. Respondent's citation of contrary evidence is irrelevant because the Fifth Circuit ruled as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The jury did not make any specific finding that Baker's negligence was the sole cause of his collision. App. 80-85. The jury's finding that Baker was not **required** to foul the track is irrelevant, as the RWPR apply whenever the work has the **potential** to foul the track. 49 C.F.R. § 214.7. Furthermore, the jury made this finding based on instructions given over Baker's objection stating the RWPR would not apply if Baker "had the same opportunity as other motorists to see and comprehend the crossing." Tr. 641, 654-57. Baker noted this jury finding went against undisputed evidence that Baker and the other drivers were required as part of their work to haul the debris across the crossing to the nearby landfill. *See* Tr. 92-94, 192,

489-92, 518, App. 15-16. The Fifth Circuit affirmed this finding, but did not identify where this issue was disputed. App. 15-16. Respondent does not cite any evidence that Baker was not required to use the crossing as part of his work.

Respondent suggests it ***previously*** did business as Canadian National/Illinois Central Railroad, but that Canadian National's rules have no application to it. However, Illinois Central has published documents indicating that on July 1, 1999, "CN takes control of Illinois Central Corporation." Doc. 140, Ex. 1, p. 2. A search on the Illinois Secretary of State's website for "Illinois Central Railroad Company," reveals Respondent ***still*** does business under that name. *See* http://www.ilsos.gov/corporatellc/CorporateLlcController [last visited January 25, 2009]. Respondent suggests trial proceeded only against Illinois Central. However, Respondent does not cite to the record for this statement, and the trial transcript shows otherwise. Tr. 1.

The remaining facts Respondent cites appear irrelevant to the questions Baker has presented. However, Baker notes he disputed Respondent's evidence regarding his ability to see and hear the oncoming train and otherwise approach the crossing like an ordinary motorist. Tr. 98, 101-02, 104, 107, 185-90, 198, 203-04, 207, 242-44, 254, 259-61, 268-70, 297-300, 352, 357-58, 608-14. Baker also noted that Respondent's claims that he did not stop at the stop sign or look to see if a train was coming were contrary to how he approached railroad crossings throughout his career as a truck-driver hauling hazardous materials.

Tr. 87-88. Respondent's own photographs showed Baker's trailer had not been straightened and was still occupying both lanes of traffic even after the collision, contradicting the testimony Respondent cites. Def. Tr. Ex. 8. Baker presented ample evidence that Respondent's failure to provide RWPR protections was a cause of the collision. Tr. 98-99, 108, 285-87, 387-422.

REPLY TO RESPONDENT'S ARGUMENT

A. Certiorari is Not Limited to Conflicting Jurisprudence

Respondent's suggestion that certiorari cannot be granted until there is a conflict between two appellate courts is contradicted by this Court's own rules, which state certiorari can be granted where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). *Rogers v. United States*, 522 U.S. 252 (1998), the case it cites, dismissed a petition not because of a lack of circuit conflict, but because the question raised was not fairly presented by the record. *Id.* at 253.

B. The Fifth Circuit's Limitation of the RWPR Creates an Important Question of Federal Law

Respondent's suggestion that certiorari cannot be granted until there is definitive proof the Fifth Circuit's

decision has undermined roadway worker protection and thereby led to injuries or fatalities is without merit. The RWPR became effective January 15, 1997 as a result of a formal notice-and-comment procedure that commenced in 1992 pursuant to a congressional mandate. App. 102-04. The purpose of these rules was to prevent persons performing railroad work from being injured or killed by trains or other equipment. 49 C.F.R. § 214.301(a). Obviously, preventing foreseeable injuries is preferable to waiting to see how many injuries and fatalities result. As a practical matter, there is no mechanism within this Court's rules by which Petitioner can reassert the Petition after there have been casualties. The Fifth Circuit's decision to ignore the plain language of the RWPR replaces the formal notice-and-comment procedure with judicial fiat.

Contrary to Respondent's suggestion, Petitioner is not suggesting that certiorari is appropriate every time a circuit court of appeals interprets federal safety regulations in favor of a defendant. Certiorari is appropriate here because the Fifth Circuit, rather than merely interpreting ambiguous regulations, elected to nullify key components of the RWPR. Respondent does not dispute that Baker was performing construction and maintenance activities when his truck was struck by the train. The RWPR state they protect workers when such duties take place "on or near track or with the potential of fouling a track." 49 C.F.R. § 214.7. The Fifth Circuit nullified the "potential of fouling a track" language by holding the RWPR

only protect workers who foul the track while on the work site. App. 8. Under that analysis, the RWPR could only apply where the employee's ordinary duties are performed "on or near track," rendering the phrase "potential of fouling a track" superfluous.

Respondent's suggestion that the FRA has the authority to strengthen RWPR protections is proven false by the Fifth Circuit's decision. Regulations cannot be effective if courts refuse to enforce them according to their plain language. Notably, it took the FRA more than four years to develop the RWPR. App. 102-04. The results of that careful, deliberative process were severely undermined by the Fifth Circuit's decision to ignore key components of the regulations.

Respondent suggests the jury decided Baker ***was not*** a "roadway worker." In fact, the district court determined Baker ***was*** a "roadway worker." Tr. 654-57. The jury held that Baker was not entitled to RWPR protections based on jury instructions imposing limitations not contained in the RWPR. *Id.*, App. 80. Obviously, it was error to allow a jury to determine a legal question. *See Redman*, cited *supra* at 1. Moreover, the RWPR apply if the worker's duties have "the **potential** of fouling a track." 49 C.F.R. § 214.7. Even if the jury's finding that Baker's work did not **require** him to foul the track had any evidentiary support, which it clearly did not, it would not be relevant to the issue of whether his duties had the **potential** to foul the track.

Respondent's suggestion that the jury found Baker's conduct to be the sole cause of the accident is not supported by the record, because the jury never reached the issue of apportionment of fault. App. 83-84. If the RWPR had been correctly interpreted, the jury would have been instructed that Respondent violated federal regulations designed to prevent the collision. Under those circumstances, the jury would have apportioned fault under proper instructions. App. 83-84.

C. The Fifth Circuit's Decision Renders Significant Portions of the RWPR Superfluous

The Fifth Circuit acknowledged Baker ***was*** fouling the track when he was hit by a train. App. 8. It held this fact was "not dispositive" because he was hit away from the worksite. *Id.* The RWPR do not contain a worksite limitation – in fact, they state the protections apply whenever a worker's activities take place "on or near track or with the potential of fouling a track." 49 C.F.R. § 214.7. It was undisputed Baker was engaged in construction and maintenance activities when he was struck by the train. While there was a significant dispute at trial as to whether Baker could approach the crossing like an ordinary motorist, that dispute is not relevant to the RWPR. The FRA did not insert any language in the RWPR suggesting their protections do not apply if a worker's risks are deemed comparable to that of a non-worker. 49 C.F.R. § 214. The FRA's decision not to do so is easily understandable – such a provision would eliminate any

ability to predict when the regulations are or are not in place, leaving workers unprotected and railroads guessing as to when they can and cannot be held liable. The Fifth Circuit did not address whether Baker ceased to be a "roadway worker" by driving his truck onto the public road in order to dump the removed debris. App. 8.

Respondent takes FRA comments completely out of context. Respondent quotes FRA comments stating "FRA believes that adequate voluntary measures are being taken to protect roadway workers at highway-rail crossings," and "The accident data studied does not provide information regarding this type of hazard." However, these sentences are lifted from a paragraph explaining that the rule is not intended to protect roadway workers from being hit by **vehicular traffic** at crossings. *See* 61 Fed. Reg. 65959, 65961 ("Neither FRA nor the Advisory Committee discussed or intended to address the hazards that vehicular traffic at grade crossings pose for roadway workers."). Baker was not hit by **vehicular traffic** – he was hit by a **train**. The FRA clearly believed railroads were not taking adequate voluntary measures to protect roadway workers from being struck by **trains**. 49 C.F.R. § 214.301(a). It therefore required railroads to provide protections to any persons performing construction or maintenance work, if that work could cause them to be hit by trains. 49 C.F.R. § 214. There is no grade crossing exception within the RWPR. *Id.*

Respondent complains that Baker's interpretation of the RWPR would require railroads to provide

on-track safety whenever their workers' duties require them to traverse a public grade crossing. As an initial matter, this is not merely Baker's interpretation, it is what the plain language of the RWPR require. Under the RWPR, railroads have two options: (1) design the work so that no worker can be hit by a train; or (2) provide any of the protections required by the RWPR, such as a watchman or flagman. This is not a particularly onerous burden. The undisputed testimony from Baker's liability expert was that every Class I railroad he contracted for provided such protections from 1965 through 1987. Tr. 388-92, 404-12, 420-28. Respondent suggests there was some way to dump the material that did not involve use of the crossing, but it does not cite any portion of the record for its argument. Moreover, it was undisputed that Baker and the other drivers were instructed to haul the debris across the crossing to the nearby landfill. Tr. 92-94, 192, 489-92, 518. This is not a situation where the worker unexpectedly chose to use a grade crossing.

Respondent's argument as to the meaning of the term "near" is unavailing. Baker's argument is not that he was working between adjacent tracks. Baker's argument is that while the RWPR do not define "near," they do define "adjacent" as being within twenty-five feet. 49 C.F.R. § 214.7. "Adjacent" in its ordinary usage is defined as "nearby." Pet'r Br. at 16-17. Contrary to Respondent's suggestion, there was testimony that the work took place within twenty feet of the tracks. Tr. 185. Respondent's claim agent

testified that "this work line here that they do not work on was approximately 25 feet." Tr. 584. The Fifth Circuit cited no basis for its holding that "near" means more than four feet but does not extend to a distance of twenty feet. App. 8. Notably, several other Class I railroads use twenty-five feet as their limit. Pet'r Br. at 5-6. Because the Fifth Circuit's holding rested on its finding as a matter of law that twenty to twenty-five feet would not be "near" track, its decision must be reversed.

D. The Petition Seeks Correction of Two Erroneous Legal Holdings

The Fifth Circuit did not properly state the rule of law. The Fifth Circuit held the RWPR do not apply to a worker's construction and maintenance activities that put him in position to be hit by a train, even though the RWPR clearly state they are applicable in such an instance. App. 7-8. The Fifth Circuit held that work taking place within twenty-five feet of the track was, as a matter of law, not "near" track without citing any basis for its conclusion, when the RWPR define the synonym "adjacent" to be anything within twenty-five feet of the tracks, and several other Class I railroads treat any work within twenty-five feet of the tracks as requiring roadway worker protection. These are erroneous legal interpretations that are clearly the proper subject of certiorari.

The district court's instructions that a "roadway worker" can lose that status if he can "see and comprehend" a crossing like an ordinary motorist has no support in the regulations, and was not endorsed by the Fifth Circuit. App. 8. The jury's finding that Baker's work did not **require** him to "foul" the track is irrelevant to the issue of whether that work had the **potential** to "foul" the track. Furthermore, the jury made this finding even though the undisputed evidence showed Baker was required by a supervisor to drive across the tracks to dump the removed debris. The issue should never have been submitted to the jury. As shown *supra*, the jury should not have been given the authority to render interpretations of law. Finally, the jury never addressed the issue of whether the work was taking place "near" track. App. 80-85.

CONCLUSION

The RWPR require railroads to provide protection to workers whose potential activities can cause them to be hit by trains. The RWPR do not contain exceptions based on the location of the worksite, the use of public crossings, or the nature of the risks the workers encounter in comparison to non-workers. The Fifth Circuit and the district court's decision to create these exceptions reduce the scope of the protections required by the plain language of the RWPR, jeopardizing the safety of roadway workers. Respondent's arguments as to the cause of the accident are factual

matters that should be addressed at a new trial in which the jury is properly instructed, and in which the jury is not asked to resolve issues that are either clearly legal in nature or in which the evidence is not disputed. Because the RWPR are necessary to prevent fatalities and severe injuries, the Petition for certiorari should be granted to restore its protections.

Respectfully submitted,

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